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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 342

GRADY ALEXANDER,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes respondent, the State of Texas, and files this its brief in opposition to the petition for writ of certiorari.

Opinions Below

Neither the original opinion of the Court of Criminal Appeals of Texas, dated April 7, 1954, nor the opinion on rehearing, dated June 2, 1954, is yet reported. Both opinions are printed in the petition.

Jurisdiction

Petitioner invokes jurisdiction under 28 U.S.C. Sec. 1257 (3).

Question Presented

Is it a denial of equal protection of the laws to try a white defendant under a burglary indictment issued by a grand jury if Negroes have been systematically excluded from that grand jury?

Constitutional Provision Involved

The Constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

Statement

On April 10, 1953, the Smith County Grand Jury indicted Grady Alexander, a white man, for Burglary of a Private Residence at Night, a felony under Article 1391, Texas Penal Code (Vernon 1948). (Tr. p. 4). Alexander moved to quash the indictment on the ground that Negroes were systematically excluded from the grand jury which returned the indictment. (Tr. pp. 31 to 36). In the hearing on this motion, two hundred and thirty-one pages of testimony were produced. The motion was found to be without merit and overruled. (Tr. p. 37). Alexander was convicted upon the testimony of an accomp-

lice witness sufficiently corroborated by inculpatory evidence. (Opinion of the Court of Criminal Appeals, Petition, p. 20.) The conviction was affirmed by the Court of Criminal Appeals on April 7, 1954, and a motion for rehearing was overruled by the Court on June 2, 1954. A second motion was overruled on June 26, 1954.

Argument

I.

Petitioner, a white man, complains that he was indicted by a grand jury selected on a basis of systematic exclusion of Negroes, and maintains that this constitutes a denial of equal protection as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Petitioner maintains that "certiorari should be granted both to assure to Alexander his Constitutional rights and to point to the Texas Courts the necessity of deciding federal questions of substance in accord with applicable decisions of this Court." (Petition, p. 13). Assuming that there was in fact a systematic exclusion of Negroes from the grand jury, this argument is without merit and not supported by the cases which Petitioner cites. (Petition, p. 12). In each of these cases, the appellant argued a denial of equal protection on the ground that there had been a systematic exclusion of the members of his own class from one or both of the juries, and this Court decided these cases on that basis. In *Hernandez v. Texas*, ___ U.S. ___, 74 S.Ct. 667 (1954), Mr. Chief Justice War-

ren, speaking for the Court, summarized the previous holdings of this Court:

> "In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers. Although the Court has had little occasion to rule on the question directly, it has been recognized since Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws."

In the instant case, Petitioner was not a member of the class which he claims was excluded from the grand jury.

II.

Petitioner makes no showing of prejudice to himself because of any exclusion of Negroes from the grand jury, and such a showing, if made, would be rebutted by the fact that the trial jury, admittedly

chosen without racial discrimination, heard the evidence and found the Petitioner guilty beyond a reasonable doubt. This result was affirmed on appeal.

Petitioner, in his Statement of the Case, intimates that he was improperly indicted under Article 1391, Texas Penal Code (Vernon 1948). (Petition p. 6). The offense of burglary under this Article consists of entering a private residence at night with the intention of committing a felony. Article 1393, Texas Penal Code (Vernon 1948)[1] defines "entry" as including the discharge of firearms into a house. The Texas law is well stated in *Garner v. State*, 31 Tex. Crim. 22, 19 S.W. 333 (1892):

> "To discharge firearms into a house with intent to injure any person therein is per se burglary, and constitutes all the force and entry necessary and essential to that crime."

See also *Cordero v. State*, 132 Tex. Crim. 93, 103 S.W. 2d 157 (1937).

In the present case, the trial jury found from the evidence beyond a reasonable doubt that the Petitioner discharged the shotgun into Israel Smith's house with the specific intent to kill and murder with malice aforethought the said Israel Smith. (Tr. pp. 62, 63).

III.

Petitioner maintains that the grand jury which indicted him was selected on the basis of a studied and deliberate exclusion of Negroes, and Petitioner

[1] See Appendix A, p. 13.

has the burden of proving his charge. *Hernandez v. Texas*, ____ U.S. ____, 74 S.Ct. 667 (1954). The Trial Court heard the evidence introduced by Petitioner to support this claim, and overruled the Motion to Quash the Indictment. (Tr. p. 37). The Record supports this ruling of the Court and clearly demonstrates that there was no discrimination in the selection of the grand jury.

The period considered at the hearing was March, 1942 to March, 1953. Of the 324 persons impaneled as grand jurors during that time, at least ten were Negroes.

There was no showing at all of how many Negroes were qualified to serve as grand jurors. Petitioner's most favorable testimony on this point was given by a Negro who had served on a grand jury in Smith County. Petitioner refers to this testimony to support his statement that the "record clearly demonstrates that there are thousands of Negoes in Smith County qualified to serve as grand jurors." (Petition, p. 8). The actual testimony is as follows:

> "Yes, bearing those qualifications in mind, I know quite a few other Negroes in Smith County, Texas, who are qualified to serve as grand jurors in this County. Yes, I know a lot of such Negroes. It would take from now until night I expect to name all I know. To the best of my knowledge, I would say that there are several hundred such Negroes in Smith County, Texas. Sure, there could be as many as a thousand."

Petitioner's own evidence shows that of the 11,514 qualified voters in Smith County in 1953, 1,982 were colored. (S.F. p. 227). Of these 1,982, only males are qualified to serve on a grand jury, and then only if they are freeholders or householders, of sound mind and good moral character, with the ability to read and write, who have not been convicted of any felony, and are not under indictment or other legal accusation for theft or a felony. Article 339, Texas Code of Criminal Procedure (Vernon 1948)[2]. No evidence was introduced to show how many of those qualified to vote possessed the additional qualifications required of grand jurors. The evidence is insufficient to establish a presumption that there has been a purposeful, systematic non-inclusion of Negroes because of their color or race.

The real issue is whether there was discrimination in the selection of the jury that indicted petitioner. The testimony of the Jury Commissioners who selected the grand jury is sufficient not only to rebut any presumption which Petitioner might have raised, but also to establish affirmatively that the grand jury was selected without discrimination:

Commissioner Adams:

> "I was born here in 1913 and have lived here in Tyler all of my life. I consider quite a few of the colored people are friends of mine. My father formerly worked them and my grandfather, and I think I've got

[2] See Appendix B, p. 13.

quite a few of them who are friends of mine. Yes, in the 50% that I estimated one of the three Grand Jury Commissioners knew personally, that would include both white and colored race. Yes, within that 50% some of those people whom we considered were colored people. Yes, we selected these persons from the group one of the three of us knew. According to my recollection there was no discrimination against a colored person as we were checking their qualifications. As their name came up, we asked if one or the other might know them. Yes, that is the way I looked at it, based solely on their qualifications without regard to race. Yes, it is correct that I deemed it feasible that at least one Negro be on the Grand Jury. No, it was not my intention to just limit it to one ... I looked at them solely upon qualification and still do.

"It is my recollection that there was no distinction on the poll tax list as to Negroes ... No, there was no criteria for us in determining the number of Negroes we were to select for a Grand Jury. (S.F. pp. 62 to 63).

Commissioner Brady:

"As a Grand Jury Commissioner, the qualifications that we looked for as we went through that list were people that we knew were good men, that one of the three of us knew, and we picked them out over the county where we would have a good repre-

sentation. Yes, I mean so that we would have people from all parts of the county . . . There were plenty of people that we knew over the county that were good men to select on this list and some to spare as to that. As to the method we used, we taken it mostly by sections, one good man to the section . . . We tried to do that, yes, sir, to sort of mentally divide the county up. When we decided that we should have a person from a certain part of the county, we would go about selecting the person by trying to think who in this locality would make a good juror. When one of the Commissioners would mention a good man from a part of the county whom he thought would make a good man, we would all discuss his qualifications. If only one man knew him, the other two would question the one man about his qualifications and what kind of a man he was. Yes, we would check to see if he was on the poll tax list, and if we decided on him, the three of us would concur in the selection.

"Yes, when we were selecting the sixteen men, we took into consideration their general reputation around their community. No, we didn't consider their ability to serve as to whether they would lose wages or income. No, we didn't take into consideration their financial standing in their particular community. Yes, we based it on their reputation as we knew it to be. Our criteria as to their reputation as we knew it was according to a man's standing, social standing in the community, whether he got along

with people, was a good man or not. In one sense, if we knew anything that would be shady on a man, we would not select him. If we knew anything that a man had done that wasn't right, we wouldn't select him as a juror . . . Before we selected these sixteen men, I imagine we considered three or four times that many . . . No, I don't know exactly how many out of that approximate number were white and how many colored. . . . Yes, there were other Negroes than Mr. Pryor discussed. I felt that this one Negro and the fifteen white men whom we selected were as good or the best qualified that we could select." (S.F. pp. 67 to 75).

Commissioner Nenney:

"We knew Mr. Pryor was a Negro, and we selected him on the Grand Jury, so naturally we discussed the fact that he was a Negro. . . . Yes, I knew Mr. Pryor before this time. Yes, I know several other Negroes whom I consider equally qualified with Mr. Pryor to serve as Grand Jurors. Yes, in my mind, I considered those persons. No, I don't believe we compared any of our selection of Grand Jurors one with another. I think we just selected them, and when we selected one, we put his name down. We were going around in districts. As to whether it is possible that there were qualified men that we did not consider, we thought that we were charged to get 16

qualified Jurors, and when we had gotten those, we were not discriminating against anyone. We felt like we had fulfilled our duty as a citizen.

"We did not reject any men because they were Negroes. . . . Yes, it is true that there were many qualified white men, as well as Negroes, on that list of such a tremendous number of names that were not considered. . . . we did the best of our ability to pick the best qualified men in this county to serve as Grand Jurors. That was without race, color, or creed entering into it. We did not say, 'We have one Negro on this and that's enough.' The race, color or creed did not enter into our selection of sixteen qualified men." (S.F. pp. 80 to 82).

It is clear from this testimony that the Commissioners honestly exercised relevant judgment in choosing the grand jury which indicted Petitioner. The Commissioners were personally acquainted with a large number of potentially qualified Negroes. They selected one of these, and he served on the jury in question. They considered the Negroes with whom they were acquainted just as they considered white persons with whom they were acquainted, and those which were not selected were found to be unqualified or unavailable.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to L. N. D. Wells, Jr., Mullinax & Wells, 1716 Jackson Street, Dallas 1, Texas, Attorney for Petitioner. (First Class Postage Prepaid.)

APPENDIX "A"

Texas Penal Code. Burglary.

Art. 1393 [1307] [841] [707] "Entry" further defined

The entry is not confined to the entrance of the whole body; it may consist of the entry of any part for the purpose of committing a felony or theft, or it may be constituted by the discharge of fire-arms or other deadly missile into the house, with intent to injure any person therein, or by the introduction of any instrument for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced. O.C. 726.

APPENDIX "B"

Texas Code of Criminal Procedure. Organization of the Grand Jury.
Art. 339 [390] [378]. Qualifications

No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony. Acts 1876, p. 78; O.C. 289; Const., art. 16, sec. 19; Acts 1903, 1st C.S., p. 16.

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THE STATE OF TEXAS,

Respondent.

Petitioner's Reply to State's Opposition to Application for Writ of Certiorari

Pursuant to Rule 24(4), petitioner, Grady Alexander, respectfully files this reply to the opposition filed by the State of Texas which was served on petitioner's counsel on October 19, 1954, and for such reply petitioner would show:

1.

The State asserts (opposition, pp. 3-4) that "petitioner was not a member of the class which he claims was excluded from the grand jury." But while Alexander is white, it is undisputed that he organizes, meets with, bargains for and attempts to improve the economic status of the Negro.

The accepted position of Myrdall and other social scientists is that "class" is made of social concepts about people, rather than of their own skin color and ancestry. If we accept this view of the sociologist, Alexander is a member of the excluded class, for the "class" thus defined, against which prejudice exists, includes not only Negroes as defined by skin color, ancestry and membership in the Negro community, but also "nigger lovers." Cf. Gunnar Myrdall, *An American Dilemma,* Harpers, 1944, Vol. 1, First Edition, passim, particularly at 677-679.

If Alexander is a member of the class (and the State does not dispute the facts which make him so within the sociologist's definition), the very holding quoted at page 4 of the "Opposition" requires that the conviction here be reversed.

2.

But assume *arguendo* Alexander's lack of actual membership in the excluded class, the actual test is "identity with the excluded group" rather than actual membership in the class. *Fay v. New York,* 332 U. S. 261, 287.[1] Here Alexander clearly was identified with the excluded group.

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[1] In the *Fay* case a five justice majority, determining the constitutionality of the "blue ribbon" New York jury, expressly reserved for later decision *"whether lack of identity with an excluded group would alone defeat an otherwise well established case under the amendment."* (Emphasis added) The majority opinion there, by the late Justice Jackson, pointed out that Fay's large net income hardly put Fay in the non-blue-ribbon category. The four dissenting justices believed the blue ribbon jury, by the nature of its method of selection, was a stacked one, and hence denied due process. They therefore did not reach the issue of whether defendant need be a member of the excluded class. But it is of extreme importance that even the majority did not speak of membership in the excluded class, but rather *"identity with an excluded group."*

Assuming that we err in all we have said above; i.e. even if Alexander is neither a member of, nor so identified with, the excluded class or race so as to come within *Hernandez v. Texas,* 347 U. S. 475 (1954), and the earlier cases of race or class exclusion,[2] nevertheless, upon a showing that either the factual or legal problems at issue are such that the discriminatory exclusions could logically be related to the issues to his possible prejudice, Alexander is denied due process and equal protection and entitled to reversal. Compare *Ballard v. U. S., 329 U. S. 187 (1946); Zap v. U. S.,* 330 U. S. 800 (1947). In the opinion in the *Ballard* case this court discusses the question of the prejudice to defendants (a mother and son) resulting from exclusion of women from the jury. Yet nowhere is it suggested that prejudice to the female defendant was greater than to the male defendant. See specifically the court's lengthy quotation with approval of Judge Denman's discourse on the prejudice resulting from exclusion of women from a jury where the issues pertained to the good faith of the defendant's religious avowals (329 U. S. at 194-195). Note the following rationale in the *Ballard* case, applicable here (329 U. S. 187 at 193-194):

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the

[2] *Hill v. Texas,* 316 U. S. 400, 404; *Avery v. Georgia,* 345 U. S. 559; *Smith v. Texas,* 311 U. S. 128; *Pierre v. Louisiana,* 306 U. S. 354; *Cassell v. Texas,* 339 U. S. 282; *Akins v. Texas,* 325 U. S. 403; *Hernandez v. Texas,* 347 U. S. 475.

other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less represenative of the community than would be true if an economic or racial group were excluded.

"The present case involves a prosecution of a mother and her son for the promotion of an allegedly fraudulent religious program."

In the *Zap* case this court upon rehearing, after *Ballard,* vacated its denial of certiorari, granted certiorari and reversed *per curiam,* with direction to dismiss the indictment, citing *Ballard.* Thus, while not explicit in the *Zap per curiam* opinion, it appears that this court there held that there was available to a male the defense of exclusion of women from juries.

See also the dictum in *Glasser v. U. S.,* 315 U. S. 60 (1942) where this court stated that if the male defendant there convicted had been able to prove his assertion that only women who were members of the League of Women Voters were used for the female portion of the array, his conviction would have been reversed. The pertinent language in the opinion is (315 U. S. at 86):

"* * * the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class.

* * *

"The deliberate selection of jurors from the membership

of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high-principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations, from training or otherwise, acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard-won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

Note also Judge Learned Hand's dictum in the recent *U. S. v. Dennis,* 183 F. 2d 201 (CA 2, 1950) at p. 216:

> 'We will assume that any party to a suit, civil or criminal, is entitled to have the particular panel which tries his case, drawn at random from a list which is not unlawfully weighted, and that he may complain ever though he has not shown that the imbalance has prejudiced him."

While the cases cited in this section of our argument relate to composition of federal, rather than state, juries, and while we are aware that in cases involving the former the exercise of a supervisory power by this court may be more appropriate, nevertheless, the cited cases demonstrate that this court has recognized that even where the defendant is neither a member of or identified with, the class discriminatorily excluded, if he can show that either the factual or legal problems involved are such that the discriminatory exclusions could logically be related to the issues to his possible prejudice he has been denied due process and equal protection and is entitled to reversal.

It is abundantly clear that a white who associates with

negroes in East Texas communities like Smith County is generally regarded as a "nigger lover" and lower in the social scale in the eyes of the East Texas community than are the Negroes with whom he is associated.[3] See Petition, pp. 9-11.[4] And note that courts throughout the South have taken judicial notice of this fact, e.g. *Sharp v. Busey,* 137 Fla. 96, 187 So. 779 (1939) where it was said:

> "* * * This is necessarily true because it is indisputable and a matter of common and general knowledge that if a white man residing in Jacksonville Beach or any where else in Duval County, Florida, were to in truth and in fact attend dances at a negro dance hall and dance with negro women, his business and social standing would be completely wrecked. He would forfeit the respect and con-[781]fidence not only of the white people of that section, but would be held in contempt and be despised by the self-respecting negro citizens."

Compare *Axton Fisher Tobacco v. Evening Post Co.,* 169 Ky. 64, 183 S. W. 269 (1916):

> "* * * It goes much further than that, as is shown in the general feeling everywhere prevailing that the negro,

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[3] This record affirmatively so demonstrates. See testimony of Sam E. Sharp, a pillar in the community, who served upon three grand juries in six years. Interrogated by Alexander's white lawyer, Oscar Mauzy, grand juror Sharp testified, "Yes, I surely am a member of the white race, are you? You don't act it." (S.F.M.Q., p. 132).

[4] The citation of page numbers is keyed to the testimony offered upon defendant's Motion to Quash the Indictment which appears in this record from pages 149 to 428. (Referred to herein as "SFMQ.") Petitioner is financially unable to purchase a copy of the entire record, and the shortness of time has not permitted petitioner's attorney to consult the copy of the official record on file in the Court of Criminal Appeals in Austin, Texas, approximately 200 miles from his office in Dallas, Texas. Accordingly we cite throughout this reply the page of the testimony in volume entitled, "Statement of Facts on Defendant's Motion to Quash Indictment." This volume commences at p. 149 of the record. Presumably p. 132 of said motion is 149 plus 132, or page 281 of the record. We are not advised, however, as to the exact pagination in the certified record.

while respected and protected in his place, is not and cannot be a fit associate for white girls or the social equal of the white race. To conditions like these that are everywhere about them as a part of the social order and domestic economy of the state, courts cannot shut their eyes. They must take notice of the long-established and uniform custom and usage of the country in respect to the position of the races and the attitude of the white race toward the negro race.

"And so we think the publication that a negro man was placed as a boss over white girls was surely calculated to arouse the hostility not only of organized labor and wage-earners, but of all right-thinking people, to such an extent as to enforce numbers of them to withdraw their patronage from a concern publicly and widely charged with employing business methods so offensive to the sentiment and good judgment of all classes of decent, white people. That this conduct was calculated to create hostility toward the tobacco company, and to injure it in a business way, is, we think, further shown by the fact stated in the publication, that the labor unions, as a result of the charge, placed this factory on the 'unfair list.' "

See to the same effect: *Roland v. State,* 137 Tenn. 663, 194 S. W. 1097 (1917); *Manning v. State,* .....Tenn....., 257 S. W. 2d 6 (Sup. Ct. Tenn., 1953); *Watkins v. Augusta Chronicle Pub. Co.,* 439 Ga. App. 43, 174 S. E. 199 (1934); *Frank v. Herring,* 208 S. W. 2d 783 (Mo. Ct. App. 1948);

"[3, 4] In Missouri it is unlawful for Negroes and whites to attend the same school and intermarriage is prohibited by statute. It is a matter of common knowledge that Negroes and whites are segregated, by inclination and by custom, in churches, hotels, restaurants, theatres and many other public places, and that they do not intermingle socially. We will take judicial notice of our statutory law, and of the general customs and usages prevailing in our

state. Rositzky v. Rositzky, 329 Mo. 662, 46 S. W. 2d 591, loc. cit. 599; 20 Am. Jur. 84, par. 63.

"[5, 6] With all of the foregoing in mind, it is inconceivable that the people of Fulton, and of that community, would interpret the association of plaintiff with a Negro, that is, 'go with,' as meaning anything other than an immoral association. Such an association, between members of the opposite sex, ordinarily implies courtship; but such a courtship as this could not lead to a legal marriage in Missouri. An assertion that the *sheriff* had 'caught' them implied, and was meant to imply, that plaintiff had been guilty of fornication with a Negro, and had been 'caught,' or apprehended, in the commission of such an act. The very atmosphere [789] that then existed in Fulton, and which must have been known to defendant to exist, coupled with his previous false statements concerning plaintiff's keeping company with a colored man, constituted sufficient evidence upon which the jury could have found, as it did find, that defendant meant to, and did, charge plaintiff with being a fornicatress; and direct opinion evidence to that effect is found in the testimony of Mrs. Crockett and of Mrs. Anthony. In view of the historical social attitude of the white people of rural Missouri toward members of the Negro race, as the same is reflected in our laws, and well known to all informed people of this state, it is doubtful if defendant could have made a false statement of and concerning plaintiff that could have humiliated and degraded her more, in the estimation of the people of that community, and of plaintiff herself, than that made herein."

The fear of the consequence of being known as a "nigger lover" is a powerful force in Southern life. Compare Erskine Caldwell's novel, "Trouble in July," Duell, Sloan and Pearce, 1940, pp. 125, 126, 233. Compare p. 18.

Systematic exclusion of Negroes from a grand jury in a community which holds such views must certainly prejudice a defendant accused of crime in connection with a labor dis-

pute in which the economic status of the negro is the principal issue.

4.

The State in its opposition tacitly recognizes this, for it devotes three-fourths of its argument to attempting to demonstrate lack of discrimination in jury selection. (Opposition pp. 4 to 12) But the Texas courts refused to hold that there was no discrimination in the selection of the grand jury; the Texas courts held that Alexander could not raise the question. Specifically: "not being a member of that race, appellant could not urge (as beneficial to him) discrimination against members of the Negro race." Opinion of Texas Court of Criminal Appeals printed at petition pp. 16, 22.

At opposition page 7 the State asserts: "The real issue is whether there was discrimination in the selection of the jury that indicted petitioner"; yet it was this "real issue" which the Texas Court refused to consider, solely because Alexander is a white man. Our complaint is not that the issue has been determined against us, but that the State courts won't even let us raise the issue.

Assuming *arguendo* that the "real issue" had been determined by the State Court adversely to Alexander, i.e. that the Texas court had held there was no discrimination in grand jury selection, such a determination would have had no adequate support in this record and would have been contrary to the overwhelming evidence, and it would be the duty of this court to "re-examine the facts to determine whether petitioner has sustained by proof his allegation of discrimination." *Cassell v. Texas,* 339 U. S. 282 at 283, and cases there cited in footnote 1.

No amount of pious declaration and statement of conclu-

sions by jury commissioners can avoid the record facts that Smith County is 29.9% negro (S.F.M.Q. 178); there are 3,845 negro married couples in Smith County with their own household (S.F.M.Q. 208); there are 9,532 white poll tax holders and 1,982 Negro poll tax holders in Smith County (S.F.M.Q. 228). No explanation appears as to why when the ratio of negro to white poll tax holders is almost 20%, the ratio in grand jury service is only 5 to 324 or less than 2%.

Nor is there any explanation as to why the "Opposition" in purporting to summarize the testimony of the commissioners who selected Alexander's grand jury, deletes any reference to the admissions appearing in Commissioner Walter Adams' testimony that *"we deemed it advisable to surely select one member of the colored race whom we thought was qualified. No we did not deem it advisable to have more than one.* (S.F.M.Q. 60).

Nor can the State's assertion at page 6 that "of the 324 persons impaneled as grand jurors during that time, at least *ten* were negroes" (emphasis added) alter the record fact that actually only *five* were negroes, four of whom were required to render multiple service on the grand jury to preserve even a semblance of Negro representation.

In the face of such a record the State's preposterous suggestion (Opposition, page 7) that Alexander must shoulder the burden of proving that each of one thousand nine hundred and eighty-two qualified colored voters was (1) male, (2) freeholder or householder, (3) of sound mind and good moral character, (4) able to read and write, (5) not convicted of felony, and (6) not under indictment or other legal accusation hardly merits reply.

It was the jury commissioner's "duty to familiarize themselves fairly with the qualifications of the eligible jurors of

the county without regard to race or color." *Smith v. Texas*, 311 U. S. 131, 132, *Cassell v. Texas*, 339 U. S. 282, 289.

And, as this court recognized in the *Cassel* case: "... with no evidence to the contrary, we must assume that a large proportion of the Negroes of ... county met the statutory requirements for jury service" 339 U. S. at 289.

Here, even though such assumption is not made, we have the admission of one jury commissioner, and statistics of record showing gross discrimination. For here, as in *Smith v. Texas*, 311 U. S. 128 (1940): "chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a Negro's name, when listed at all, almost invariably appeared as number 16, ..." (See 311 U. S. at 131; Cf. S. F. M. Q. pp. 233-258).

Smith v. Texas also disposes of the State's argument "that the testimony of the commissioners themselves shows that there was no arbitrary or systematic exclusions." For as this court well recognized "this is at best the testimony of two individuals who participated in drawing one out of 32 jury panels discussed in the record .... even if their testimony were given the greatest possible effect, and their situation considered typical that of the 94 commissioners who did not testify, we would still feel compelled to reverse the decision below." (311 U. S. 128 at 132).

5.

The State's suggestion (Opposition Point II) that the error is rendered harmless by virtue of the petit jury finding Alexander guilty has been foreclosed by this court. That was the very argument made by the late Mr. Justic Jackson dissenting

in the *Cassell* case. Mr. Justice Jackson argued (339 U. S. 282 at 302) "It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice..." But the majority of this court were not persuaded. They reversed the conviction. They should do so here.

CONCLUSION

Almost daily the public press reports instances of reaction often violent, by disciples of the discredited "white supremacy" theory, against public officials and private citizens attempting to carry into effect this Honorable Court's recent holding in the public school segregation cases. This reaction is directed against the white man, as well as the Negro, in the affected areas. Those leading the "white supremists" make no distinction based upon race when unleashing their poison of race hatred. The non-Negro advocate of insuring the economic well being or the constitutional liberties of the Negro is entitled to the same constitutional guarantee of due process as is the Negro himself. The evolution of the South toward equality before the law for all men demands that a state court be required to determine questions of discrimination upon the facts, and not upon the color of the aggrieved litigant.

The petition for certiorari should be granted and the conviction reversed.

Respectfully submitted,

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ADDENDUM

In *Buchanan v. Warley*, 245 U. S. 60 (1917), the Supreme Court recognized that a white person might attack the validity of a racially restrictive ordinance where a discriminatory effect on Negroes also affected him. The court took specific note that (page 72) "The objection is made that this writ of error should be dismissed because the alleged denial of constitutional right involves only the rights of colored persons, and the plaintiff in error is a white person." In overruling this objection the court said (page 73) "the right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property and had obligated himself to take it." Similarly in *Hurd v. Hodge*, 334 U. S. 24, 34 (1948), one of the petitioners was a white person. The court repeatedly mentions his race as white in dealing with the restrictive covenant but in no wise held the white property owner less qualified to attack the restrictive covenant than the colored buyers.

CERTIFICATE OF SERVICE

A copy of this reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, has been served this date on Honorable John Ben Shepperd, the Attorney General of Texas, Capitol Station, Austin, Texas, and Honorable Harry Loftis, Criminal District Attorney, Tyler, Texas, attorneys for respondent, by placing properly addressed copies of the same in the United States mails, first class postage prepaid.

L. N. D. Wells, Jr.